

20
TRIBES

INTER TRIBAL COUNCIL of ARIZONA, INC.

MEMBER TRIBES

AK-CHIN INDIAN COMMUNITY
COCOPAH TRIBE
COLORADO RIVER INDIAN TRIBES
FORT McDOWELL YAVAPAI NATION
FORT MOJAVE TRIBE
GILA RIVER INDIAN COMMUNITY
HAVASUPAI TRIBE
HOPI TRIBE
HUALAPAI TRIBE
KAIBAB-PAIUTE TRIBE
PASCUA YAQUI TRIBE
PUEBLO OF ZUNI
QUECHAN TRIBE
SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY
SAN CARLOS APACHE TRIBE
TOHONO O'ODHAM NATION
TONTON APACHE TRIBE
WHITE MOUNTAIN APACHE TRIBE
YAVAPAI APACHE NATION
YAVAPAI PRESCOTT INDIAN TRIBE

Date: January 28, 2010

To: Mr. Darrick Moe, Desert Southwest Regional Manager, Western Area Power Administration

From: Mr. John R. Lewis, Executive Director, Inter Tribal Council of Arizona, Inc. *JRL*

Re: Western Area Power Administration, Hoover Dam Power Re-Allocation

The electrical energy output of this public power project is scheduled to be reallocated as of October 1, 2017. Due to the complexities of this process, the Western Area Power Administration (Western) initiated a series of public meetings as published in the November 20, 2009, Federal Register Notice.

The Inter Tribal Council of Arizona, Inc. along with the Arizona Tribal Energy Association and tribal leadership representatives from Arizona and California have been attending these public meetings. In response, a public comment paper was developed which addresses Western's stated intentions regarding the Hoover re-allocation.

The Inter Tribal Council of Arizona, Inc. comment paper is attached for your review and consideration.

Attachment

20
TRIBES

INTER TRIBAL COUNCIL of ARIZONA, INC.

January 29, 2010

Mr. Darrick Moe
Desert Southwest Regional Manager
Western Area Power Administration
P.O. Box 6457
Phoenix, AZ 85005-6457

RE: Comments of the Inter Tribal Council of Arizona, Inc. on the Boulder Canyon Project – Post 2017 Application of the Energy Planning and Management Program Power Marketing Initiative Federal Register Notice of November 20, 2009

Dear Mr. Moe:

The following represent the public comment submission of Inter Tribal Council of Arizona, Inc. (ITCA) in response to Western's call for the same in its Federal Register Notice of November 20, 2009 regarding the Boulder Canyon Project.

The ITCA addresses Western's expressly noted areas for comment in turn below and sets out its additional comments thereafter.

1. Application of the Power Marketing Initiative to the Boulder Canyon Project

The ITCA considers the Power Marketing Initiative ("PMI") to apply to the Boulder Canyon Project as current legal authority does not preclude the same and Western has applied this protocol to all other Federal power projects since its implementation in 1995.

Section 617d(b) of Title 43 of the U.S. Code provides that "the holder of any [Hoover power] contract for electrical energy not in default . . . shall be entitled to a renewal . . . upon such terms and conditions *as may be authorized or required under the then existing laws and regulations* . . ." [emphasis added]. ITCA considers this language to expressly provide for Western's regulatory action at the time current contracts expire; as the PMI was a purely regulatory action by the agency, its application to Hoover does not conflict with other relevant, existing legal authority. Furthermore, the PMI expressly protects pre-existing contractors, ensuring that any action by Western to apply the PMI is consistent with the renewal provision set out in Federal law.

ITCA considers the intent behind the PMI to support equitable distribution of this public resource and to confirm that such must be redefined through periodic resource reallocation as communities within the service area change over time. In the absence of the PMI, ITCA questions what approach Western would utilize in allocating the resource as of October 1, 2017. In the absence of the PMI or any new tribal customer allowance, ITCA would consider asserting independent claims to Project power prior or in response to such an action.

2. Quantity of Resources Extended to Existing Customers

ITCA asserts that the application of the PMI can be accomplished consistent with its purpose of assuring the provision of future resource planning stability to existing customers. ITCA asserts that the PMI application can achieve this assurance while only renewing a 90% share of the current allocations otherwise expiring in September 2017. Western's current proposal is too extreme in its protection of currently contracted shares as against the interests of potential new contractors, especially Federally-recognized Native American governments with lands within the Project service area.

In addition, the ITCA is not persuaded that the quantities of energy and capacity set out in Western's proposal meet the equitable redistribution mandate of the PMI. The disparately impacted economic interests of new tribal customers and their members outweigh the need to almost completely insulate existing customers in a reallocation process.

3. Size of Proposed Resource Pool

The quantity of the resources extended to new tribal customers should equal 10% of the total Project energy and capacity output. Such a total is on par with the share offered new tribal customers in other Western projects involving tribes as new customers. A 10% "tribal pool" is necessary to address proportionately larger economic impacts of current regional economic conditions and the significant number of tribes in the Project service area in comparison to other Western preference customers similarly located. This share is also consistent with Western's practices in allocating a portion of output from other projects, as was done initially for Pick-Sloan, based at least in part on projected tribal needs.

4. Excess Energy Provisions

New tribal customers should receive an option to purchase any excess energy available during any calendar year in proportion to their share of power or at least on the same proportionate basis as that made available to existing customers.

5. Term of Contracts

ITCA upports the creation of at least 30-year contracts in the 2017 reallocation. The Act only provides for a 50-year term limitation, being otherwise silent as to a specifically required term. [See 43 U.S.C. Section 617d(a)]

6. Additional Comments

a. Consistent with current U.S. Department of Energy Native American policy, Western must maintain a government-to-government relationship with Federally-recognized Native American governments. On this basis ITCA rejects the notion that any new tribal customer with lands inside the boundaries of Arizona or Nevada should be required to receive its allocation through the Arizona Power Authority (“APA”) or Colorado River Commission of Nevada (“CRC”), respectively.

In addition, neither Federal nor Arizona legal authority vests in the APA any express authority to contract with tribes for this purpose and the State of Arizona also lacks any general authority to require the same. Western has not previously required tribes to contract for preference power directly through non-Federal governmental agencies. While ITCA does not desire to limit any tribe wishing to engage itself with one or more of these states or their power distribution entities, ITCA asserts that Western has no authority to require receipt of tribal allocations through the APA or CRC.

Furthermore, language in the Act is silent as to tribes. Federal Indian law including statutes and court rulings since 1928, the year of the original language governing Hoover, includes authority recognizing significant limits on state jurisdiction over tribal interests. These actions affirm that only Congress, acting specifically and affirmatively, can limit tribal governmental or regulatory authority. Even in cases involving state versus tribal authority over non-Indians on Indian lands, the U.S. Supreme Court has held that state authority does not apply when it interferes with tribal self-government. As Western’s conveyance of hydroelectric power to tribes from other Federal public power projects has consistently recognized and supported tribal self-government, tribal receipt of power from Hoover must be accomplished in the same manner.

Also, the Act of 1928 and the amendments that have followed presage an evolution of tribes as utility market participants. Federal law and policy have consistently sought to reinforce the progress of tribes as self-governing and with sufficient capacity to address their own needs. Western’s execution of other power contracts with tribes to date were intended to and have furthered tribal utility capability increases; to now require tribes to revert to state authority in Arizona or Nevada in conjunction with Hoover only would be wholly inconsistent with those notions, violating overarching Federal policy applicable to all Federal agencies in their government-to-government dealings with the nation’s tribal interests.

Finally, Arizona has never asserted general jurisdiction over tribes within its boundaries. Instead, Arizona rejected assumption of this authority when it declined to adopt the same through Public Law 280, a Federal statute affording states broader authority over tribes for certain purposes.

b. ITCA urges Western to extend the deadline for this comment process to ensure that all tribes in the Hoover service area will have sufficient time to become familiar with

the allocation and submit comments supporting their interests. At present, ITCA believes that few tribes in the Project service area are even aware of the potential to obtain Hoover in 2017 and therefore have no knowledge of this first stage of the process to reallocate Project output, despite its potentially significant impact on their future Hoover contracting opportunities.

Furthermore, as noted in Western's "December 2009 PIF Q and A," sent on January 15, 2010, Western itself has even yet to specifically identify all tribes within the Project marketing area, despite requests for the same more than one year ago by tribal interests.

ITCA appreciates the opportunity to submit these comments in furtherance of its desire to obtain some portion of hydroelectric power generated through the Boulder Canyon Project; ITCA also supports the comments submitted by the Arizona Tribal Energy Association and other tribal interests.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Lewis".

John R. Lewis,
Executive Director
Inter Tribal Council of Arizona, Inc.